

MAY 22 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

CGU/HAWKEYE SECURITY INSURANCE
COMPANY; UNITED STATES FIDELITY
& GUARANTY COMPANY,

Plaintiffs - Appellees,

v.

OASIS LAS VEGAS MOTOR COACH
PARK, L.P.; TORINO CONSTRUCTION
CORPORATION OF NEVADA,

Defendants - Appellants,

and

ST. PAUL FIRE & MARINE INSURANCE
COMPANY; WALCHOP, INC.,

Defendants.

No. 02-15401

D.C. No. CV-99-01781-RLH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted March 12, 2003
Resubmitted May 22, 2003
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: KOZINSKI, GRABER, and BERZON, Circuit Judges.

Nevada law governs our interpretation of Walchop's insurance policies. We "construe the terms of an insurance policy in their plain and ordinary sense and from the viewpoint of one not trained in law." Vitale v. Jefferson Ins. Co., 5 P.3d 1054, 1057 (Nev. 2000) (per curiam) (citing Nat'l Union Fire Ins. Co. v. Reno's Executive Air, Inc., 682 P.2d 1380, 1382 (Nev. 1984) (per curiam)). Any ambiguity in an insurance policy "must be construed against the insurer and in favor of the insured." Id. An insurer's policy restrictions and exclusions must "clearly and distinctly communicate[] to the insured the nature of the limitation." Id.

The "Work Performed Exclusion" contained in Walchop's insurance policies excludes coverage for damage to the concrete pads resulting from Walchop's own work but not from the work of a "subcontractor," a term not defined in the policies. As recognized by the district court, the term is not defined by any applicable Nevada statute either. Black's Law Dictionary defines a "subcontractor" as one "who is awarded a portion of an existing contract by a contractor." BLACK'S LAW DICTIONARY 1155 (7th ed. 2000); see also MERRIAM-

WEBSTER'S COLLEGIATE DICTIONARY 1171 (10th ed. 1999) (a subcontractor is "an individual . . . contracting to perform part or all of another's contract").

Nevada Revised Statute § 40.620 describes a "contractor" as a person who "1. [d]evelops, constructs, alters, repairs, improves or landscapes a residence, appurtenance or any part thereof." Section 624.020 defines a contractor as "any person . . . who . . . undertakes to . . . construct, alter, repair, add to, subtract from, [or] improve . . . any building, highway, road, . . . or other structure." Nev. Rev. Stat. § 624.020(2). A "contractor" under this provision, not directly applicable here, "includes a subcontractor or specialty contractor, but does not include anyone who merely furnishes materials or supplies without fabricating them into . . . the work of a contractor." Id. § 624.020(3).

In its contract with Torino, Walchop undertook to prepare the subgrade, build the wooden forms, mix and pour the concrete, and perform every other function necessary to construct the concrete pads. Ready Mix assumed the "mix and pour" portion of Walchop's primary contract. In doing so, Ready Mix performed work on-site, placing material – concrete – permanently in the pads under construction. This activity was part of the actual process of building the pads, and part of the construction activity Walchop had been hired to perform.

Looking at the plain meaning of the contract and the presumptions in favor of the insured, we therefore find the district court's conclusion that Ready Mix was a materialman to be in error. Ready Mix did not merely deliver concrete but took over a portion of Walchop's contract by performing construction work on-site.

REVERSED and REMANDED.